

1 THE HONORABLE THOMAS S. ZILLY
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8 UNITED STATES DISTRICT COURT
9 FOR THE WESTERN DISTRICT OF WASHINGTON
10 AT SEATTLE

11 UNITED STATES OF AMERICA,

12 Plaintiff,

No. CR06-305Z

13 VS.

ORDER

14 ALBERT KWOK-LEUNG KWAN,

15 Defendant.

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17 THIS MATTER comes before the Court on the United States' Motion to Dismiss
18 Defendant's Civil Action for Equitable Relief for Failure to State a Claim, docket
19 no. 186. Having reviewed the papers filed in support of, and opposition to, the motion,
20 the Court hereby DENIES the motion.

21 A. VP70M and its Associated Stock and Associated Stock of VP70Z

22 Kwan has requested that the VP70M and two stocks be sent to Len Savage in
23 Franklin, Georgia. The Government objects to the return of this property arguing that
24 a defendant's motion for return of seized property should be denied if a defendant is
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1 not entitled to the lawful possession of the seized property. See United States v.
2 Cauwenberghhe, 934 F.2d 1048, 1061 (9th Cir. 1991). Additionally, the Government
3 relies on two federal statutes as examples where Congress has articulated that property
4 may not be returned if possession would be illegal. See 18 U.S.C. § 924(d)(1)
5 (acquittal under Gun Control Act where forfeiture not allowed if return of property
6 would place owner in violation of law); 18 U.S.C. § 983(a)(1)(F) (where notice
7 improper, government must give property back unless person cannot legally possess
8 property). While Kwan admits that he may not legally possess the VP70M in
9 Washington, whether or not Kwan can legally possess the VP70M and two stocks in
10 Washington is not relevant. See reply to United States' motion to dismiss at 2 (docket
11 no. 187). Kwan is not requesting that these weapons be returned to him; he requests
12 that the VP70M and two stocks be sent to locations outside of Washington where they
13 are presumably legal.
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15 The Government then argues that Kwan may not have the weapons sent out of
16 state. According to the Government, where a person cannot legally possess the
17 weapon, the person cannot delegate a possessory interest to an agent or third party.
18 See United States v. Craig, F. Supp. 85, 89 (N.D.N.Y. 1995); United States v.
19 Headley, 50 Fed. Appx. 266, 267 (6th Cir. 2002). In both Craig and Headley,
20 defendants were convicted in federal court and state court, respectively, and they
21 sought to transfer the weapons they were unable to possess because of the convictions.
22 Unlike Craig and Headley, Kwan has not been convicted of any crime; Craig and
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1 Headley, therefore, are distinguishable. Accordingly, the Court DENIES the motion to
2 dismiss with respect to the VP70M and the two stocks (one from the VP70Z and the
3 other from the VP70M).
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5 **B. VP70Z**

6 Kwan has also requested that the VP70Z pistol be returned to him because
7 possession under federal and state law is legal. Conversely, the Government argues
8 that Kwan is not entitled to the VP70Z because the VP70Z and its stock should be
9 treated together, which would make possession of both a violation under RCW
10 § 9.41.190 (constituting a “short-barreled” rifle). The Government cites a number of
11 cases where courts have held that a disassembled and inoperable firearm can constitute
12 a firearm for purposes of the state statute. See, e.g., State v. Padilla, 95 Wn.2d 531,
13 532 (1999) (where disassembled firearm could be rendered operational with
14 reasonable effort and within a reasonable time period). The VP70Z and its associated
15 stock will not be in the same state. Neither the cases, nor any of the Government’s
16 other arguments address this. Accordingly, the Court DENIES the motion to dismiss
17 with respect to the VP70Z.
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19 **C. M-14**

20 Kwan has requested compensation for the destroyed M-14. The Government,
21 however, argues that Kwan should not be compensated for the destruction of the M-14
22 because he had “unclean hands.” See Keystone Driller Co. v. Gen. Excavator Co.,
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1 290 U.S. 240, 245 (1993). A court may not exercise equitable powers where the
2 person has acted fraudulently, or who by deceit or any unfair means has gained an
3 advantage. Id. According to the Government, Kwan was denied a permit for the
4 M-14's storage in Washington, but ATF nonetheless found the M-14 in his Bellevue
5 home. The Government admits that after the M-14 was found, ATF gave permission
6 for Kwan to move the M-14 to Nevada. Motion to dismiss at 17 (docket no. 186).
7 Since the Government did not pursue legal action, there is no proof of "unclean
8 hands," only allegations in the motion. More importantly, since the Government
9 agreed to the transfer after the alleged illegal possession, it cannot now try to punish
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11 Kwan.

13 The Government also points to the fact that Kwan lost his Federal Firearms
14 Licenses as additional proof of "unclean hands." Kwan lost his license because
15 (1) Kwan had not used his Federal Firearms Licenses for their intended purposes, and
16 (2) Kwan had not cooperated with the ATF inspectors when they attempted to conduct
17 inspections at Kwan's licensed premises. Kwan v. BATF, 2005 WL 1994072 at *1.
18 This was not a criminal matter, but an appeal from the licensing board; it only
19 concerned his license to manufacture guns and ammunition; it would not have
20 rendered him unable to keep the M-14 in Nevada and therefore does not preclude the
21 return or compensation for the M-14. Accordingly, the Court DENIES the motion to
22 dismiss with respect to the M-14.
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D. M-14 Parts

Kwan has requested compensation for the destroyed M-14 parts. The Government, on the other hand, argues that he should not be compensated because possession of the M-14 parts would violate RCW § 9.41.190. Kwan does not address whether or not the parts would be illegal to possess under Washington law. If possession of the parts is illegal, then he may not be entitled to compensation for their destruction. There are material issues of fact as to whether possession of these parts would be illegal under Washington law. Accordingly, the Court DENIES the motion to dismiss with respect to the M-14 parts.

IT IS SO ORDERED.

DATED this 22nd day of June, 2011.

Thomas S. Bally

Thomas S. Zilly
United States District Judge